Supreme Court, U.S.
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No. 90-1432

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

HAROLD W. CLARKE, THE WARDEN OF THE
NEBRASKA STATE PENITENTIARY, Petitioner,

v.

WELDON ROSS, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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June 6, 1991

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QUESTIONS PRESENTED

1. Whether the question which is the subject of this Petition for Writ of Certiorari is moot as the respondent Weldon Ross served his full sentence and was discharged on December 13, 1990.

2. Whether or not there is a Fourteenth Amendment constitutional right to credit for presentence incarceration, when the prisoner is held for a bailable offense, the prisoner is unable to make bail because of indigence, and upon conviction the prisoner is sentenced to less than the statutory maximum and/or said sentence in addition to the presentence incarceration time does not exceed the statutory maximum sentence for such offense.

LIST OF PARTIES

Respondent accepts petitioner's list of parties.

TABLE OF AUTHORITIES

CASES:

Carafas v. LaValle, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968) 3, 5

Faye v. Gray, 541 F.2d 665 (7th Cir. 1976) 10

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Sibron v. State of New York, 392 U.S. 40, 88 S.Ct. 1989, 20 L.Ed.2d 917 (1968) 1, 2, 3

Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1910) 3

St. Pierre v. United States, 319 U.S. 41, 63 S.Ct. 910 87 L.Ed 1199 (1943) 1

Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 10, 39 L.Ed.2d 505 (1974) 4

Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) 8, 9

Vasquez v. Cooper, 862 F.2d 250 (10th Cir. 1988) 9

Weinstein v Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975) 3

Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) 7, 8, 9

OPINIONS BELOW

Respondent accepts petitioner's statement of the opinions in the District Court and Court of Appeals.

JURISDICTION

Respondent accepts petitioner's statement of Jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

ARGUMENT

I.

THE QUESTION WHICH IS THE SUBJECT OF THIS PETITION FOR WRIT OF CERTIORARI IS MOOT.

As correctly set forth by Petitioner Harold Clarke, the Respondent Weldon Ross was discharged from the Nebraska State Penitentiary and from the authority of the Nebraska Department of Correctional Services on December 13, 1990, after satisfying his full sentence. It is respondent's position that the United States Supreme Court should not grant a writ of certiorari for this action as there no longer remains a subject matter on which the judgment of this Court could operate. See St. Pierre v. United States, 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed 1199 (1943). Further, there are no circumstances present which would allow this appeal to fall within the exceptions to the mootness doctrine.

Petitioner Clarke argues that the analysis of Sibron v. State of New York, 392 U.S. 40, 88 S.Ct. 1989, 20 L.Ed.2d 917 (1968), and those relevant cases decided prior to Sibron, are applicable to the question of whether the present action is moot. Clarke sets forth two exceptions to the mootness doctrine as set forth in Sibron and St. Pierre; namely that a state cannot thwart access to appellate review until a prisoner has been released, then argue mootness, and secondly, that penalties or disabilities can be imposed as the result of a judgment which has been satisfied so that there would remain a live controversy for review. Clarke concludes that the present action is not moot as "[i]t cannot be clearly demonstrated that there is no possibility that any legal consequences would be

imposed on the basis of the challenged conviction." (Petition For Writ at 14).

Decided after Sibron and not addressed by petitioner Clarke, is Lane v. Williams, 455 U.S. 624, 102 S.Ct. 1322, 71 L.Ed.2d 508 (1982). In Lane, the defendants had pleaded guilty in state court prosecutions for burglary but were not informed of the mandatory parole term. The defendants completed their sentences, were paroled, then incarcerated once again for parole violations.

The Lane respondents filed habeas corpus actions alleging a violation of due process because of the failure of the trial court to advise him of the parole requirements. The court ordered specific performance of the bargained sentences rather than requiring that defendants plead their cases anew. Later, the defendants were released from custody.

On appeal to the Supreme Court of the United States, the former inmates pursued their claim that their constitutional rights had been violated. However, this Court held that the question was moot because the defendants chose to challenge the alleged constitutional violation in a manner by which the consequence for their harm would be removed, and in the course of their challenge, the harm expired on its own. The Lane Court further provided that "[n]ullification of a conviction may have important benefits for a defendant ... but urging in a habeas corpus proceeding the correction of a sentence already served is another matter." Id. at 631, 102 S.Ct. at 1327 (quoting North Carolina v. Rice 404 U.S. 244, 248, 92 S.Ct. 402, 405, 30 L.Ed.2d 413 (1971)).

The Lane Court also examined holdings of the previous Courts in Carafas v. LaValle, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), and Sibron, stating that the holdings of those cases were inapplicable to the case before it because in Sibron, and in Carafas, the underlying convictions were challenged, and the permanence of such convictions held sufficient collateral effects to keep the cases from being moot. The Lane Court further stated that no civil disabilities such as those present in Carafas were in existence in the case at hand.

Finally, the Lane Court held that the case before it was not a case "capable of repetition yet evading review". Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1910). The Lane Court stated that the Southern Pacific doctrine is applicable only where there is a "reasonable expectation that the same complaining party would be subject to the same action again." Id. at ____, 102 S.Ct. at 1328, (quoting Weinstein v Bradford,423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975)). The Court reasoned that the respondents would be aware in the future that any sentence would include a mandatory parole term, the problem of advising them in a plea would not again present itself. The Court also concluded that "[t]he possibility that other persons may litigate a similar claim does not save this case from mootness." Id.

In applying the analysis of Lane to the present action, because Ross served his full sentence and was discharged, and due to the fact that Ross attacked only the computation of his

sentence, there are no disabilities or adverse consequences which would flow from having this case declared moot. Thus, Ross urges this Court to follow the reasoning in Lane, and declare the present appeal moot.

Since Lane, this Court has not addressed a question of mootness applicable to the present case. However relying on Lane, the Tenth Circuit in Johnson v. Riveland, 855 F.2d 1477 (10th Cir. 1988), addressed a habeas corpus petition for jail time credit prior to sentencing for a state prisoner who had been paroled. The Tenth Circuit found that the case was moot, and remanded the same with directions to dismiss for mootness.

In Johnson, the petitioner was a state prisoner who filed a habeas corpus action asserting he was denied credit for time spent in pretrial confinement for both sentences involving a maximum term and a minimum term. Although the petitioner was paroled while his habeas petition was pending in federal district court, the district court, under the Equal Protection Clause, granted the requested relief for both the maximum and minimum terms to which petitioner had been sentenced.

As previously set forth, the Tenth Circuit on its own motion, dismissed the appeal for mootness. The court, citing Steffel v. Thompson, 415 U.S. 452, 459, n.10, 94 S.Ct. 1209, 1216 n.10, 39 L.Ed.2d 505 (1974), stated as follows:

> A federal court's inability "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." [citation omitted]. [F]ederal courts are

> without power to decide questions that cannot affect the rights of litigants in the case before them." [citation omitted].

Id. at 1480. Further, the court noted that although discrimination against indigents in sentencing was a matter of public interest, the court could not "ignore the requirements of Article III under which the exercise of judicial power depends upon the existence of a case or controversy." Id.

In its analysis, the court reviewed other federal court decisions relating to habeas challenges and mootness. Included in its review, the Tenth Circuit examined the Carafas decision that the end of a habeas petitioner's sentence did not terminate jurisdiction because of the "disabilities and burdens" which could flow from the conviction. The Tenth Circuit also reviewed the holding in Lane wherein the petitioners' claims were moot for the reason that they were only challenging their sentences, not their convictions and were urging the "correction of a sentence already served." Id. at 1481 (quoting Lane, supra at 631, 102 S.Ct. at 1327).

In holding that "Lane dictated dismissal of [the petitioner's] claim regarding credit against the minimum sentence," the Tenth Circuit stated as follows:

> [The petitioner Johnson] is not challenging his convictions or sentence, but only the way that his minimum sentence was computed. [citation omitted]. Johnson has already served the minimum sentence as commuted and has not shown any direct or collateral consequences that will survive his release on parole. [citation omitted]. Johnson's claim for relief does not come within the exceptions to the mootness doctrine. He is not

> challenging the underlying conviction or sentence, which even if completely served, imposes collateral legal consequences and disabilities. [citation omitted]. Additionally, Johnson's claim for post-parole credit to be applied toward his minimum sentence does not fit within the exceptional cases which are not class actions but are "capable of repetition, yet evading review." Johnson has obtained parole and will not face again the issue of serving the minimum sentence which is determinative of an initial parole date.

Id. at 1481-82.

The court, after addressing matters relating to the parole of petitioner, concluded as follows:

> We have no reason to doubt the State's profession that Johnson's entitlement to presentence credit against the maximum sentence will be respected. Johnson does not claim any impropriety in the manner in which this credit has been calculated. Lacking any basis for assuming the State will arbitrarily revoke that which has been granted and represented to this court as an unchallenged issue, we find no live controversy warranting a decision on the merits. Any future relitigation of this issue between the parties is unhindered if we vacate the district court's judgment and remand with directions to dismiss for mootness. [citation omitted].

Id. at 1484-85.

As set forth in Lane and Johnson, Ross did not challenge his conviction, but only the computation of his sentence. Further, he will not suffer any direct or collateral consequences from not having the circumstances prompting his petition for habeas corpus relief reviewed by this Court as he fully served his sentence and there is no chance of being incarcerated on the offense for which he fully served his sentence. Further, there is no reasonable

expectation that Ross will be arrested, held due to inability to post bail because of indigency, sentenced to a term less than the statutory maximum, and with a sentencing court refusing to grant credit for the time served.

II.

THE BETTER REASONED DECISIONS HOLD THAT A DEFENDANT UNABLE TO MAKE BAIL DUE TO INDIGENCY IS ENTITLED TO CREDIT FOR TIME SERVED PRIOR TO SENTENCING REGARDLESS OF WHETHER THE SENTENCE IMPOSED IS LESS THAN THE STATUTORY MAXIMUM FOR THE OFFENSE.

Notwithstanding the issue of mootness, the petitioner is requesting that this Court grant a Writ of Certiorari to review whether the Eighth Circuit was correct in granting habeas corpus relief to respondent Ross. Specifically, the petitioner challenges whether Ross was entitled to credit for time served prior to sentencing due to his indigency when he did not receive the statutory maximum sentence for his offense.

In granting respondent Ross' claim for relief, the Eighth Circuit relied on its holding in King v. Wyrick, 516 F.2d 321 (8th Cir. 1975). (Appendix to Petition for Writ of Certiorari, p.1a). In King, an inmate in the state prison system initiated a habeas corpus proceeding in which it was asserted that jail time credit should have been awarded by the sentencing judge on two concurrent prison sentences. The petitioner in King argued, inter alia, that the denial of the credit was a denial of his equal protection rights because a wealthier person would not have had to serve the additional jail time due to the ability to post bail. In its opinion, the King court first acknowledged that the rationale of the decisions of the United States Supreme Court in Williams v.

Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), and Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), extended to credits for presentence jail time served due to an inability to post bail. The Eighth Circuit then provided an analysis of the Equal Protection Clause of the Fourteenth Amendment and its application where the indigent prisoner is denied jail time credit on a prison term which is less than the statutory maximum term. The central point to this analysis was that an indigent prisoner would have to spend a longer period of time incarcerated than a wealthier prisoner able to post bail and avoid the same incarceration. In so holding, the Eighth Circuit stated that its result followed from the holding in Williams v. Illinois, in that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." Id. at 323 (quoting Williams v. Illinois, 399 U.S. 235, 244, 90 S.Ct. 2018, 2023, 26 L.Ed.2d 586).

Petitioner Clarke contends that the King court exceeded this Court's decision in Williams v. Illinois, for the reason that there is "not a constitutional right not to be subjected to imprisonment beyond the statutory maximum solely because of indigence." (Petitioner's Petitioner for Writ of Certiorari at 8-9). Respondent Ross does not dispute that he received less than the statutory maximum term for being sentenced as a habitual criminal under the Nebraska statutes. Ross does dispute however, the limited interpretation of Williams v. Illinois urged by Clarke

ignores the plain language set forth in Williams. As further stated in Williams, 399 U.S. at 242, 90 S.Ct. 2018, 2023, 26 L.Ed.2d 586,

> [b]y making the maximum confinement contingent upon one's ability to pay, the state has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

The Williams court "simply held that when an indigent prisoner would end up serving a prison term longer than the statutory maximum, converting a fine into imprisonment works an 'invidious discrimination.'" Vasquez v. Cooper, 862 F.2d 250 (10th Cir. 1988) (Logan, J., dissenting). Williams does not limit, as Clarke contends, the availability of when an indigent person must receive credit for time served prior to sentencing to sentences for the statutory maximum term only.

Clarke also contends that the later holding of this Court in Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), also limits jail time credits for indigent prisoners to when prisoners receive the maximum sentence. As set forth in the dissent to Vasquez v. Cooper, Tate can be analyzed as follows:

> [The] question is not whether the defendant always has a constitutional "right" to have pre-conviction time credited against the eventual sentence, but rather whether an indigent defendant suffers invidious discrimination in violation of the Equal Protection Clause when the court expressly refuses to credit pre-conviction incarceration time even though a wealthier defendant could have posted bail and thus would serve less

> time in prison for the same offense than the indigent defendant.

Id. at 257.

Respondent concedes that the Eighth Circuit holding in King v. Wyrick conflicts with the holdings in certain other circuits which have decided cases with similar issues. However, the Eighth Circuit is joined by the Seventh Circuit in the case of Johnson v. Prast, 548 F.2d 699 (7th Cir. 1977), in which it was held that the Equal Protection Clause requires that a state sentencing judge consider presentence custody in sentencing even though the total time imposed does not exceed the statutory maximum term. The Seventh Circuit based its ruling in Johnson and its predecessor case, Faye v. Gray, 541 F.2d 665 (1976), on the reasoning from Williams v. Illinois, cited above.

The better reasoned decisions, which are based on the decisions of this Court in Williams and Tate, simply provide that a sentencing judge must grant the indigent defendant, who was unable to post bail due to that indigency, credit for time served prior to sentencing regardless of whether the sentence imposed was less than the statutory maximum term. The reason for this requirement is that if such credit were not granted, an indigent defendant would have spent more time incarcerated than a wealthier defendant for the same offense and such differing treatment violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, respondent Ross respectfully requests this Court deny the Petition for Writ of Certiorari and enter an Order for the same.

Respectfully submitted,

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